Ranjit Singh a/l Jarnail Singh v Malayan Banking Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL ACTION NO S3–22–1831 OF 2004
ASMABI MOHAMAD JC
18 JUNE 2011

Land Law — Charge — Order for sale — Plaintiff purchased charged property at public auction — Order for sale and auction sale declared void and set aside for breach of foreclosure procedure by chargee — Purchase price paid by plaintiff refunded — Whether plaintiff had any cause of action for damages against chargee — Whether plaintiff's claim statute barred

The plaintiff purchased a property in a court-ordered public auction as a result of foreclosure proceedings initiated by the defendant/chargee ('MBB'). The plaintiff settled the full purchase price with the court but found he was unable to have the property transferred into his name because a private caveat had been entered on the property by the chargor's daughter. The chargor applied to set aside the order for sale, the directions of court pursuant thereto and the auction sale on the ground MBB failed to serve him with notice of the adjourned hearing of the foreclosure proceedings contrary to the National Land Code ('NLC') and O 83 of the Rules of the High Court 1980 ('RHC'). The plaintiff was allowed to intervene in the chargor's application. The High Court granted the prayers sought by the chargor, ordered the purchase price to the refunded to the intervener/plaintiff and also ordered damages to be assessed and paid to the chargor and the intervener/plaintiff. MBB appealed the decision to the Court of Appeal which affirmed the High Court's verdict but set aside the order for damages to be paid to the chargor and the plaintiff. The plaintiff then filed the instant action against MBB for damages based on breach of contract, misrepresentation, negligence and breach of duty. The plaintiff claimed it suffered loss and was denied ownership of the property due to MBB's omissions and negligence in the conduct of the foreclosure proceedings. The defendant, inter alia, said the plaintiff was estopped in law and fact from claiming damages against it and, in any event, the claim was statute barred.

Held, dismissing the claim with RM50,000 costs:

(1) The plaintiff's claim was statute barred. His cause of action, if any, against the defendant would have arisen on 14 June 1997, the day the order for sale, directions for sale and auction sale were set aside. The plaintiff ought to have filed his claim on or by 13 June 2003 but he only did so on 16 December 2004 (see para 38).

(2) The plaintiff was not entitled to general or special damages because he

failed to establish a case either for breach of contract or for tort. The damages claimed were the same as the damages ordered by the High Court which was set aside by the Court of Appeal. The plaintiff was bound by the finality of the Court of Appeal's judgment. Further, with the full refund of the purchase price, the plaintiff had been put back to the position before the sale took place (see paras 40–42).

(3) As the auction was held to be void, there could never be a contract between the plaintiff and the defendant. The plaintiff also failed to show any elements of actionable misrepresentation made by the defendant which induced him to purchase the property at the auction (see paras 20 & 29).

(4) In enforcing its rights under the charge, the defendant did not owe any duty to the plaintiff. Pursuant to O 83 of the RHC and s 256 of the NLC, the chargee's duty of care, if any, was towards the chargor of the property and not to the successful bidder (see para 32).

(5) The plaintiff was not entitled to claim under the tort of negligence as he did not have either legal ownership of or possessory title to the property (see para 33).

(6) The plaintiff's claim failed for want of certainty of cause of action. The claim incorporated a cumulative plea of different causes of action and no election was made as to which cause of action was being relied upon at the trial (see para 36).

[Bahasa Malaysia summary

Plaintif membeli sebidang hartanah di lelongan awam yang diperintahkan mahkamah akibat daripada prosiding perampasan yang dimulakan oleh defendan/pemegang gadaian ('MBB'). Plaintif telah membayar harga belian sepenuhnya dengan mahkamah tetapi didapati dia tidak boleh memindahkan hartanah tersebut ke atas namanya kerana satu kaveat persendirian telah didaftarkan ke atas hartanah oleh anak perempuan penggadai. Penggadai memohon untuk mengetepikan perintah belian, aturan-aturan mahkamah yang berkaitan dan jualan lelong atas alasan MBB gagal untuk menyerahkan notis penangguhan pendengaran prosiding perampasan kepadanya dan bercanggah dengan Kanun Tanah Negara ('KTN') dan A 83 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Plaintif dibenarkan untuk mencelah dalam permohonan penggadai. Mahkamah Tinggi membenarkan permohonan-permohonan yang dituntut oleh penggadai, mengarahkan harga belian dipulangkan kepada pencelah/plaintif dan juga mengarahkan ganti rugi dinilai dan dibayar kepada pencelah/plaintif. MBB merayu terhadap keputusan tersebut kepada Mahkamah Rayuan yang mengesahkan keputusan Mahkamah Tinggi, tetapi mengetepikan perintah untuk ganti rugi dibayar kepada penggadai dan plaintif. Plaintif kemudiannya memfailkan tindakan ini terhadap MBB untuk ganti rugi berdasarkan pelanggaran kontrak, salah

nyataan, kecuaian dan pelanggaran kewajipan. Plaintif mendakwa bahawa dia mengalami kerugian dan dinafikan milikan hartanah disebabkan peninggalan dan kecuaian MBB dalam tindakan prosiding perampasan. Defendan, bagaimanapun, mengatakan bahawa plaintif diestop dari segi undang-undang dan fakta untuk menuntut ganti rugi terhadapnya dan dalam mana-mana keadaan, tuntutan tersebut dihalang oleh statut.

Diputuskan, mengetepikan tuntutan dengan kos RM50,000:

(1) Tuntutan plaintif adalah dihalang oleh statut. Kausa tindakannya, sekiranya ada terhadap defendan, seharusnya timbul pada 14 Jun 1997, hari perintah untuk jualan, aturan-aturan untuk jualan dan jualan lelong diketepikan. Plaintif seharusnya memfailkan tuntutannya pada atau sebelum 13 Jun 2003 tetapi dia hanya berbuat demikian pada 16 Disember 2004 (lihat perenggan 38).

(2) Plaintif tidak berhak untuk ganti rugi umum atau ganti rugi khas kerana dia gagal untuk membuktikan satu kes sama ada untuk pelanggaran kontrak atau tort. Ganti rugi yang dituntut adalah sama dengan ganti rugi yang diarahkan oleh Mahkamah Tinggi yang diketepikan oleh Mahkamah Rayuan. Plaintif terikat dengan kemuktamadan penghakiman Mahkamah Rayuan. Seterusnya, dengan pemulangan sepenuhnya harga belian, plaintif diletakkan kembali dalam kedudukan sebelum jualan tersebut mengambil tempat (lihat perenggan 40–42).

(3) Memandangkan lelongan tersebut diputuskan sebagai terbatal, tiada kontrak antara plaintif dan defendan. Plaintif juga gagal menunjukkan apa-aya elemen salah nyataan boleh dakwa yang dibuat oleh defendan yang mendorongnya untuk membeli hartanah di lelongan (lihat perenggan 20 & 29).

(4) Dalam menguatkuasakan haknya di bawah gadaian, defendan tidak mempunyai sebarang kewajipan kepada plaintif. Menurut A 83 KMT dan s 256 KTN, kewajipan berjaga-jaga pemegang gadaian, sekiranya ada, adalah terhadap penggadai hartanah dan bukannya kepada pembida yang berjaya (lihat perenggan 32).

(5) Plaintif tidak berhak untuk menuntut di bawah kecuaian tort memandangkan dia tidak mempunyai milikan sah atau memiliki geran kepada hartanah (lihat perenggan 33).

(6) Tuntutan plaintif gagal kerana ketiadaan kepastian dalam kausa tindakan. Tuntutan tersebut memasukkan satu rayuan kumulatif kausa-kausa tindakan berbeza dan tiada pilihan dibuat untuk menentukan yang mana satu kausa tindakan yang digunakan pada perbicaraan (lihat perenggan 36).]

Notes

For cases on order for sale, see 8(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2614–2975.

Cases referred to

Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals [2003] 1 MLJ 567; [2003] 1 CLJ 585, CA (refd)

Balakrishnan Devaraj & Anor v Admiral Cove Development Sdn Bhd [2010] MLJU 576;; [2010] 7 CLJ 152, CA (refd)

British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd [1912] AC 673, HL (refd)

Donoghue v Stevenson [1932] AC 562, HL (refd)

Hay v Young [1943] AC 92, HL (refd)

Malayan Banking Bhd v PK Rajamani & Anor [2004] 3 MLJ 28; [2004] 3 CLJ 79, CA (refd)

Parasuraman a/l Kuppan v Sazali bin Md Akhir & Anor [1997] 4 AMR 4090, HC (refd)

Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener) and another appeal [1994] 2 MLJ 601 at p 602; [1994] 2 CLJ 705, SC (refd)

Sim Thong Realty Sdn Bhd v Teh Kim Dar Tee Kim [2003] 3 MLJ 460; [2003] 3 CLJ 227, CA (refd)

United Malayan Banking Corp Bhd v Chong Bun Sun and another application [1994] 2 MLJ 221, HC (refd)

Legislation referred to

Limitation Act 1953 s 6
National Land Code s 256
Rules of the High Court 1980 O 83

Wan Balbir Singh (Wan Balbir & Associates) for the plaintiff.
Cheah Tien Eu Suhaimi (Khor Zulkifli & Chang) for the defendant.

Asmabi Mohamad JC:

INTRODUCTION

[1] By this re-amended summons dated 4 January 2011, and statement of claim re-dated 14 July 2005 ('SOC') the plaintiff commenced an action against the defendant for breach of contract, misrepresentation both contractual and tortuous, negligence and breach of fiduciary duty.

[2] After a full trial, I find that the plaintiff has failed to prove his claim on the balance of probabilities and dismissed the plaintiff's case with costs in the sum of RM50,000 payable by the plaintiff to the defendant. Aggrieved by the

decision, the plaintiff filed an appeal to the Court of Appeal of Malaysia against the whole of the said decision.

DOCUMENTS

[3] At the outset of the trial parties have agreed for the following documents to be used:

(a) bundle of pleadings — 'A';

(b) common bundle of agreed documents — 'B';

(c) issues to be tried — 'C'; and

(d) statement of agreed facts — 'D'.

THE ISSUES TO BE TRIED

[4] For ease of reference the issues as set out in document marked as 'C' are reproduced below as follows:

For the Plaintiff

(i) Whether the Defendant is liable to the Plaintiff;

(ii) Whether the Defendant is liable to pay damages to the Plaintiff as ordered by the High Court and the Court of Appeal;

For the Defendant

(i) Whether the Plaintiff is estopped in fact and in law to claim and obtain an order for damages against the Defendant;

(ii) Whether the Plaintiff is estopped in fact and in law to file a claim against the Defendant; and

(iii) Whether the plaintiff's claim is barred pursuant to the Limitation Act 1953.

BRIEF BACKGROUND

[5] The background of the facts leading to the plaintiff's claim in this action could be gleaned from the judgment of the High Court in respect of the Originating Summons No S6–31–1058 of 1987 ('the OS') (exh D13 —pp 64–74 of document 'B') and the judgment of the Court of Appeal in the case of *Malayan Banking Bhd v PK Rajamani & Anor* [2004] 3 MLJ 28; [2004] 3 CLJ 79 ('exh P22').

[6] The plaintiff in the OS is now the defendant in this action whilst the defendant in the OS was the registered proprietor of the property who had

created a charge over the said property in the defendant's favour to secure a loan granted to Sira Communications and General Contractors, who was the borrower. The plaintiff in this case was the intervener in the OS. For the purpose of the case at hand wherever relevant the plaintiff and the defendant in the OS will be described as the chargee and the chargor respectively.

THE CASE FOR THE PLAINTIFF

[7] The plaintiff came to know of a proclamation of sale (exh p1 — pp 36–39 common bundle of document (document 'B')) in respect of a property held under Grant No 9691, Lot No 26673 (previously held under HS(D) 22274, PT No 615) Mukim Kuala Lumpur, Daerah Kuala Lumpur, Negeri Selangor (the said 'property') through a friend. The plaintiff then proceeded to make a search at the land office at Kuala Lumpur and was orally informed by an officer at the said land office that in respect of the said property there were two presentations entered by the defendant as the chargee of the said property vide Presentation No 12358/84 Jilid 432, Folio 65 and Presentation No 21536/84 Jilid 364 Folio 194 (exh P2 pp 1–22 of document 'B').

[8] Pursuant to an order for sale dated 15 February 1988 issued by the High Court of Malaya at Kuala Lumpur (p 25 of document 'B') the said property was ordered to be auctioned under s 256 of the National Land Code ('NLC') at a public auction ('the auction') on 12 September 1990, at the reserved price of RM115,000. The auction was conducted by the deputy registrar of the High Court at Kuala Lumpur with the assistance of a licensed auctioneer. On the day of the auction the plaintiff presented himself at the said auction, bid and became a successful bidder for the said property at the purchase price of RM116,000. On the same day the plaintiff paid a deposit in the sum of RM11,600 which is equivalent to 10% of the reserved price to the deputy registrar of the High Court (exh P3 — p 120 of document 'B').

[9] The plaintiff then proceeded to obtain loans from Bank Simpanan Nasional (BSN) for RM55,000 and another sum of RM49,400 from his family members to make up the balance of the purchase price of RM104,400 to be paid to the deputy registrar. These payments were made by Messrs Baharuddin AN & Co (exh P4 — pp 121–122 of document 'B') on or about 27 November 1990. On 14 January 1991 Form 16F (exh P5 – pp 40–41 of document 'B') was issued to the plaintiff.

[10] However the said property could not be transferred to the plaintiff because there was a private caveat entered on the aforesaid property by the daughter of the chargor, one Sivakami a/p Rajamani on 24 September 1990 (exh P6 —pp 145–146 of document 'B').

[11] By an amended summons in chambers dated 14 March 1991 (exh D 14 — pp 49–53 of document 'B'), the chargor took out an application, inter alia, for orders of the court to set aside the order for sale dated 15 February 1988, the directions of 12 August 1988 and the sale of the said property by way of public auction on 12 September 1990. The principal ground of complaint was that the notice of the adjourned hearing was not served on the chargor. The prayers sought by the chargor in the OS were granted by an order of the court dated 14 June 1997. The details of the order could be seen in exh D13 — pp 64–74 bundle 'B'. The chargee in the OS then filed an appeal to the Court of Appeal against the decision of the High Court vide Civil Appeal No W-02–601 of 1999 and this appeal was dismissed by the Court of Appeal on 23 November 2002 as the order for sale of the said property was tainted with impropriety due to the chargee's failure to adhere to the provisions of the NLC and O 83 of the Rules of the High Court 1980 ('RHC'). Hence the order of the High Court was affirmed by the Court of Appeal except for the order for damages to be assessed and be paid to the defendant and the intervener, which was set aside by the Court of Appeal. There was no order for damages made to the plaintiff and the chargor. The Court of Appeal had also ordered for the purchase price paid by the intervener in the OS to be refunded in full to the intervener forthwith.

[12] The judgment of the High Court in respect of the OS is as in exh D13 —pp 64–74 of document 'B' and the judgment of the Court of Appeal is as in exh P22 (loose copy tendered in court).

CASE FOR THE DEFENDANT

[13] The chargor, who was the registered proprietor of the aforesaid property had created a 'third party charge' over the aforesaidproperty in favour of the chargee (defendant in the current case) to secure a loan granted to Sira Communications and General Contractors who was the borrower. The said charge was registered vide Presentation No 12358/84 Jilid 432, Folio 65 and Presentation No 21536/84 Jilid 364 Folio 194 (exh P2 – pp 1–22 of document 'B'). When the borrower defaulted the chargee in the OS took out proceedings to obtain an order for sale which was granted by the court on 15 February 1988 (pp 25–7 of the document 'B'). Pursuant to the proclamation of sale (exh P1 pp 1–22 of document 'B' the auction was to be held on 12 September 1990. At the time of the property was put up for sale on 12 September 1990 the chargor did not challenge and or dispute the order for sale granted by the High Court on 15 February 1988. After the order for sale was made and very much later after the auction was conducted by the deputy registrar with the assistance of a public auctioneer, the chargor had filed an application to set aside the order for sale (exh D14 – pp 49–51 of the document 'B') which was granted by the court on 14 June 1997 (exh D13 — pp 64–74 of document 'B'). The plaintiff has filed an application for leave to intervene in the said proceedings (pp 54–57 of

document 'B') which was granted by the said court. At all material times, the plaintiff did not take a position which was adverse or contrary to the defendant's position in opposing the chargor's application to set side the orders granted by the court on 15 February 1988. Aggrieved by the said decision, the chargee had filed an appeal to the Court of Appeal and the said appeal was dismissed by the Court of Appeal on 23 November 2002. In short the Court of Appeal agreed with the decision of the High Court except for the order of damages ordered by the High Court which was set aside.

FINDINGS OF THE COURT

[14] Before I attempt to resolve the issues posed by both parties as stated in document marked as 'C' I propose to deal with the various points of submissions raised by both learned counsel for the defendant as well as for the plaintiff covering topics such as breach of contract, misrepresentation both contractual and tortuous negligence and breach of duty relied by the plaintiff to sustain a claim against the defendant.

Issue (1) — Breach of contract

[15] It was argued by learned counsel for the plaintiff that on the facts of this case a valid contract existed between the plaintiff and the defendant and that the defendant had breached the said contract when order for sale, the directions for sale and the sale were held to be a nullity resulting in the losses suffered by the plaintiff. Learned counsel further submitted that the defendant had a duty to take due care in exercising its powers to undertake the sale. The plaintiff in this case was willing and able to complete the contract but as a result of the defendant's negligence and breach of the terms of the charge and non compliance with the provisions of the NLC and O 83 of the RHC the plaintiff was not able to affect the transfer of the property to his name.

[16] It is not disputed that in exh P1— pp 36–39 of document 'B' the defendant had not been identified as the vendor. The position of the defendant in this case could not be equated to that of a vendor under the normal sale and purchase transaction of property as submitted by learned counsel for the plaintiff. The defendant was merely enforcing his rights as a chargee by exercising his statutory remedy against a chargor in default. The defendant in this case is not the vendor as it is not the registered proprietor of the said property. This is further fortified by the fact that pursuant to para 2 of the conditions of sale ('exh P1') the defendant being a registered chargee in respect of the said property was also at liberty to bid at the said sale. In view of this the defendant could not be said to be the vendor and at the same time the purchaser of the said property as understood by the plaintiff.

[17] In an application for an order for sale under s 256 of the NLC and pursuant to O 83 of the RHC the court must make an order for sale unless it is satisfied of the existence of the cause to the contrary (pl see *United Malayan Banking Corp Bhd v Chong Bun Sun and another application* [1994] 2 MLJ 221). The fact that the order for sale (pp 25–27 of document 'B') as in the OS was made, it must be presumed that at the time the said order was made the court was satisfied that there did not exist any cause to the contrary. The order of the court was a good, valid and a perfect order to be complied by all relevant parties affected by it. Until it is set aside or varied by proper application, a perfected order approved by the registrar, even though it contains the wrong interpretation of a decision, cannot be treated like a nullity but must be implicitly obeyed (pl see *Parasuraman a/l Kuppan v Sazali bin Md Akhir & Anor* [1997] 4 AMR 4090).

[18] It has been held in the case of *Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener) and another appeal* [1994] 2 MLJ 601 at p 602; [1994] 2 CLJ 705 at p 706 that a person to and or against whom an order is made and or directed has a legal duty to abide by the said order notwithstanding the fact that its validity may be challenged or disputed. His Lordship justice Peh Swee Chin (as His Lordship then was) at pp 610–611(MLJ); at p 713(CLJ) said:

> We are of the considered view that an order of the superior court such as High Court, even if it is eg an order obtained ex-parte or a default judgment, until set aside, it must be obeyed by everyone whether its validity is challenged or not, and 'It is plain and unqualified obligation of every person against whom or in respect of whom an order is made by a court of competent jurisdiction to obey the order until the same is discharged', per Romer LJ in *Hadkinson v Hadkinson* [1952] 2 All ER 567. This passage was quoted with approval and adopted by this court in *Pembinaan KSY Sdn Bhd v Lian Seng Properties* [1991] 1 MLJ 100. It was stated in *Issacs v Robertson* [1984] 3 All ER 140 that it was misleading to describe such an order of competent jurisdiction as void or voidable, for every order must be obeyed until it was set aside and 'these are not orders which are void ipso facto without the need for proceedings to set aside'. One of the reasons is that such a superior court must be presumed to have the jurisdiction to make and order which it has made. Every order made by a superior court must be regarded as an order of competent jurisdiction.

[19] In the case before me the whole process which led to the sale of the said property to the plaintiff was made at the instant of a valid and effective order for sale issued by the superior court of a competent jurisdiction. The said order had to be obeyed and complied with by the defendant and all parties concerned. At the material time there was no pending application by any person to set aside the order for sale and there was no challenge or protest by the chargor against the order for sale and or the public auction. It was only on 14 June 1997, that is, about nine years after the sale went through that the said order was set aside

by the High Court. It is pertinent to note that what is relevant to be considered here is, at the time the sale took place there existed a valid and an effective order for sale issued by the court to be obeyed and complied by all parties concerned. At that material time the defendant therefore had the authority to exercise his rights pursuant to the order for sale and had acted within the authority allowed by the law.

[20] Further I am of the view that there is no contract between the plaintiff and the defendant as the High Court had ordered that the order for sale, the directions and the sale of the said property at the auction to be set aside and that the sale price paid by the intervener to be refunded in full ('exh D13'). The decision of the High Court had been upheld by the Court of Appeal where the said court had held that the order for sale is a nullity and it is void, and 'all that followed in its wake was equally void' (exh P22). As the auction had been held to be void and set aside, there can never be a contract between the plaintiff and the defendant. That being the case the plaintiff's contention that the defendant had breached the terms of the contract is therefore without merits.

[21] Further the High Court had made an order for the full purchase price paid by the plaintiff to the deputy registrar to be refunded to the plaintiff forthwith (exh P7 — pp 42–44 of document 'B') and this order was confirmed by the Court of Appeal (exh P8 – pp 45–47 of document 'B'). The above order of the High Court and affirmed by the Court of Appeal for the whole amount paid by the plaintiff towards the purchase price for the purpose of the said sale had put the plaintiff back to the position of status quo ante or original position, that is, the position before the transaction took place. Further the full purchase price had been paid to the plaintiff in full the plaintiff should not therefore now be allowed to take the benefit from the refund of the purchase price and then to also benefit again for damages allegedly for breach of contract. In short the plaintiff should not be allowed to have a second bite of the cherry.

[22] For the reasons I have discussed above the plaintiff's claim premised on the breach of contract is without merits and ought to be dismissed by this court.

Issue (2) – Misrepresentation

[23] Before I deal with the plaintiff's second point of contention, that is, the issue of misrepresentation I propose to examine some of the definitions given by decided cases for better understanding of the above term. In *Balakrishnan Devaraj & Anor v Admiral Cove Development Sdn Bhd* [2010] MLJU 576;; [2010] 7 CLJ 152 at p 160 Justice Abdul Malik Ishak said:

Put in another way, a misrepresentation must be a false statement of existing fact which is normally made prior to, or during the preliminary stages of a contract and is made with the intention of and had the effect of inducing the party to whom it is made to enter into the contract with the representor.

[24] His Lordship Justice Gopal Sri Ram (as His Lordship then was) in *Sim Thong Realty Sdn Bhd v Teh Kim Dar Tee Kim* [2003] 3 MLJ 460; [2003] 3 CLJ 227 said:

Now the elements of an actionable misrepresentation are well settled. They are set out as follows in *Professor's Mckendrik's Contract Law*, (3rd Ed), a leading work on the subject:

> A misrepresentation may be defined as an unambiguous, false statement of fact which is addressed to the party misled and which materially induces the contract. This definition may be broken down into three distinct elements. The first is that the representation must be unambiguous false statement of fact, the second is that it must be addressed to a party misled and third is that it must be material inducement to entry into the contract.

At p 238:

> Now, it is trite that the expression 'misrepresentation' is merely descriptive of a false pre-contractual statement that induces a contract or other transaction. But it does not reflect the state of mind of the representor at the relevant time. The state of mind of the representor at the time he made the representation to the representee varies according to the circumstances of each case. It may be fraudulent. It may be negligent. Or it may be entirely innocent, that is to say, the product of the mind that is free from deceit and inadvertence … Put another way, a misrepresentation is innocent 'where the representor believes the assertion to be true and consequently has no intention of deceiving the representee (Chershire & Fifoot, *Law of Contract*, (6th Ed). It is in particular of state of mind of the representor that determines the nature of the remedy available to the representees.

[25] His Lordship justice Abdul Malik Ishak JCA had this to say:

> Put in another way, a misrepresentation must be false statement of existing fact which is normally made prior to, or during the preliminary stages of a contract and is made with the intention of and has the effect of inducing the party to whom it is made to enter into the contract with the representor.

(pl see *Balakrishnan Devaraj & Anor v Admiral Cove Development Sdn Bhd* [2010] 7 CLJ 152 at p 160)

[26] The facts of this case disclosed that there was no communication

whatsoever between the defendant and the plaintiff which had induced the plaintiff to bid at the said auction on 12 September 1990 and to pay the price that he had bid for the property. According to the evidence adduced during the course of the trial the plaintiff came to know about the proclamation of sale as in exh P1 — pp 36–39 of document 'B') through a friend and decided to bid at the said auction. At the time exh P1 (pp 36–36 of document 'B') was circulated there existed two valid orders given by the High Court on 15 February 1988 and 12 August 1988 respectively. At the material time there was no application taken out by the chargor or any interested person to set aside the orders issued under the seal and by a court of competent jurisdiction. The perfect and valid order for sale could not be termed as unambiguous, false statement of facts as illustrated by *Professor McKendrik's Contract Law*, (3rd Ed), as quoted by His Lordship Justice Gopal Sri Ram JCA (as His Lordship then was) in *Sim Thong Realty Sdn Bhd v Teh Kim Dar*, which the plaintiff alleged had misled and or induced the him into entering the alleged contract with the defendant. Neither can it be termed as a false pre-contractual statement that had induced the transaction as illustrated in the same book of *Professor McKendrik's Contract Law*, (3rd Ed), also quoted by His Lordship Justice Gopal Sri Ram JCA (as His Lordship then was) in the *Sim Thong Realty Sdn Bhd v Teh Kim Dar*. Such an order also could not be termed as a false statement of existing facts made prior to or during the preliminary stages of a contract as illustrated by His Lordship Justice Abdul Malik Ishak JCA in *Balakrishnan Devaraj & Anor v Admiral Cove Development Sdn Bhd*.

[27] The evidence disclosed in the course of trial was that as at 14 September 1990 the order for sale, the directions for sale and the sale were valid orders of the court. These orders were subsequently set aside on 14 June 1997 on the application of the chargor. By this time the plaintiff had already paid the full amount due under the said sale. The only impediment faced by the plaintiff to have the said property transferred in his name was because of the presence of a private caveat entered by the charger's daughter on the 24 September 1990.

[28] It is not disputed that the proclamation for sale and all other directions thereto in connection with the said sale of the property were made pursuant to valid orders by the court of a competent jurisdiction leaving parties with no choice but to adhere to the said order of the court. Further as has been illustrated by a line of authorities, the Supreme Court case of (*Puah Bee Hong & Anor v Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener) and another appeal* is a good example, the order of the court of a competent jurisdiction is valid and must be obeyed by everyone until set aside or quashed by a court of a competent jurisdiction.

[29] The plaintiff has failed miserably to show that there were elements of actionable misrepresentation as discussed above and or negligent and or

innocent misrepresentation made by the defendant which had induced the plaintiff to purchase the said property at the auction.

[30] As there was a valid order of the court in existence at the time of the sale, that is, on 14 September 1990 the plaintiff's contention that there were elements of misrepresentation cannot hold water and ought to be dismissed by this court. The same argument as set out under issue (1) at paras 17–19 above are repeated herein.

Issue (3) — Negligence and breach of duty

[31] Other than breach of contract and misrepresentation the plaintiff too has premised his claim on the tort of negligence. In order to succeed in a claim for negligence the plaintiff must establish four main ingredients under this tort. Firstly the plaintiff must show that he was owed a duty of care. Secondly the plaintiff must show that the defendant has breached that duty of care and thirdly that the breach of the duty has caused harm to the plaintiff. Lastly the plaintiff must prove that he has suffered damages that is not too remote. The above principle of law also known as the Atkinian principle was established by Lord Atkin in the landmark case of *Donoghue v Stevenson* [1932] AC 562 where at p 580 His Lordship Lord Atkin aptly said:

> The rule that you are to love your neighbour becomes law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? Receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law is my neighbour? The answer seems to be — the persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

[32] The issue here is whether the defendant in this case owed the plaintiff this duty of care as alleged by the plaintiff. The plaintiff had stated at para 8 of his SOC that the defendant had failed to exercise his duty of care as a diligent chargee. There were allegations by the plaintiff that the defendant has failed to fulfill certain obligations that a chargee ought to have done. The plaintiff however had not particularised in his pleadings the alleged duty of care that was said to have been breached by the defendant. I am of the view that in an application of this nature where the chargee has opted to enforce his rights under a charge there is no duty owed by the defendant to the plaintiff. Pursuant to O 83 of the RHC and s 256 of the NLC the chargee's duty of care, if any, is towards the chargor of the property and not the plaintiff, the successful bidder. Once an order for sale has been made it is presumed that the order for sale issued by the court of a competent jurisdiction had already taken care of the

interest of the potential bidder and complied with relevant statutory requirements unless such order is set aside subsequently by an order of a court of a competent jurisdiction.

[33] Other than that, in a claim under the tort of negligence the plaintiff must satisfy the court that he has either the legal ownership of or possessory title to the said property at the time the loss or damage had occasioned. The plaintiff would not succeed in a claim under this head if he merely showed that he has contractual rights to the property which has been adversely affected (pl see *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567; [2003] 1 CLJ 585 at p 613. The plaintiff very own evidence disclosed that the transfer of the property to his name could not be effected as there was a private caveat lodged by the daughter of the chargor on 24 September 1990. This proved the said property was never legally transferred to the plaintiff. That being the case the plaintiff therefore would not be able to prove that he has legal ownership and or possessory title to the property to entitle him to claim under the tort of negligence. Further the High Court and the Court of Appeal had made the order for the purchase price paid by the plaintiff to be refunded in full. The plaintiff in this case has been fully reinstated to his original status quo before as if the alleged sale has not been concluded. This ground relied upon by the plaintiff too is without merits and ought to be dismissed by this court.

Issue (4) — Uncertainty of cause action

[34] As I have illustrated above the plaintiff had failed to prove his claims which were premised on breach of contract, misrepresentation, negligence as well as breach of duty. The plaintiff has incorporated all these heads of claims in his SOC without making an election during the trial as to which was the cause of action relevant to the plaintiff's facts. The manner the plaintiff had crafted his SOC was as if the plaintiff was unsure and uncertain as to what was his cause of action against the defendant; whether it was breach of contract, misrepresentation or negligence and breach of fiduciary duty.

[35] In regards to the plaintiff's failure to elect on his cause of action and or the plaintiff's cumulative plea of causes of action, Justice Abdul Malik Ishak (now JCA) had this to say (at p 216):

> (2) At the trial, the plaintiff did not elect as to which was the cause of action: whether it was breach of the term or misrepresentation. The cumulative plea of a breach of a term and misrepresentation was mutually inconsistent and both must, in law, fail for want of certainty.
>
> And at p 225 His Lordship said:

A I must categorically state that the cause of action and the remedies for misrepresentation and breach of a contract are entirely different The cause of action, in the case of non-compliance with the term, is that of breach of contract and the remedy is for damages. But where the representation remains a representation then the contract is said to be avoidable in that it remains valid until and unless rescinded by the innocent party (*Low Keang Guan v Sin Heap Lee-Marubani Sdn Bhd* [2005] 7 MLJ 216).

[36] Upon perusal of the plaintiff's SOC I found that the plaintiff has not stated with clarity which are the particulars of breach of contract and misrepresentation the plaintiff was relying on. In fact the plaintiff did not make any material distinction between what is misrepresentation and breach of contract. The breach of the term of contract and misrepresentation are two different things and cannot co-exist. The plaintiff ought to have elected as to which was his cause of action. As these two causes of action are different the plaintiffs cumulative plea of these causes of action must fail for want of uncertainty.

Issue (5) — Limitation

[37] Another issue raised by the defendant in its defence is that the plaintiff's action against the defendant is caught by s 6 of the Limitation Act 1953 as it was brought after the expiration of six years from the date on which the matters allegedly gave rise to the cause of action arose (para 18 of the defence — document 'A').

[38] I am of the view that the plaintiff's cause of action against the defendant, if any, would have arisen on the 14 June 1997, that is, on the day the order for sale, the directions for sale and the sale were set aside by the court. The plaintiff ought to have filed his claim against the defendant on or by 13 June 2003. In view of the fact that this claim was filed on 16 December 2004 the plaintiff's claim is therefore barred by the statute of limitation. On this ground alone the plaintiff's claim ought to be dismissed by this court.

H DAMAGES

Whether the plaintiff is entitled to general and special damages

[39] I will now proceed to deal with the issue of damages as claimed by the plaintiff in his SOC. The summary of the plaintiff's claim for special and general damages are as stated at para 67 of the plaintiff's written submission. The person who is claiming damages must satisfy the court as to the fact of damage and as to its quantum. Assuming that a claimant was able to prove his opponent is liable, damages would be awarded to the claimant in order to

compensate him for loss and damage. Before such an award is made by the court, the claimant in an action must satisfy the court that the defendant had committed a wrong either pursuant to a breach of contract or a tort. His Lordship Lord Wright in *Hay v Young* [1943] AC 92, at p 106 said:

> Damage due to the legitimate exercise of a right is not actionable, even if the actor contemplates the damage. It is *damnum absque injuria*. The damage must be attributable to the breach by the defendant of some duty owing to the plaintiff.

[40] As I have submitted above the plaintiff has failed to prove his claim under contract, that is, for breach of contract or misrepresentation or breach of duty or negligence. The plaintiff is therefore not entitled to damages whether general or special damages as claimed by him in his SOC. The plaintiff's claims allegedly for loss of capital appreciation of the property in the sum of RM434,000, loss of rental in the sum of RM256,280, loss of interest paid amounting to RM28,546.24, loss of insurance paid for the sum of RM1,836.76 and loss of adjudication fee for RM1,772 are irrecoverable as all these claims are allegedly for damages for breach of contract. Likewise since the plaintiff has failed to establish a case for negligence against the defendant the plaintiff is also not entitled to damages.

[41] As I have explained in the preceding paragraphs the plaintiff has failed to establish his claim for misrepresentation the plaintiff therefore is not entitled to damages. Further even assuming the plaintiff has succeeded in his claim for negligent misrepresentation the plaintiff would not be entitled to claim for loss of value of appreciation of the property and for loss of rental as the remedy opened for him in the event negligent misrepresentation is satisfactorily proven on the balance of probability, is rescission of the sale and purchase agreement. The purpose of this type of remedy is to terminate the contract ab initio and to restore the plaintiff back to his original position (pl see *Balakrishnan Devaraj & Anor v Admiral Cove Development Sdn Bhd*). The two items of damages claimed by the plaintiff in this case, that is, for loss of value of the property and loss of rental is obviously not with the intention of restoring the plaintiff to a position before the contract was entered into between parties but to enrich the plaintiff further, over and above the full refund of the purchase price ordered by the High Court and re affirmed by the Court of Appeal.

[42] Further as the Court of Appeal has already directed that all the auction price be paid back in full to the plaintiff, the plaintiff has therefore been restored to the status quo and his position was reinstated to a position prior to the alleged sale.

[43] As regards to the plaintiff's claim for special damages such as interest paid to BSN in the sum of RM60,000, stamp duty on the said property for

RM10,000, insurance for the said property for RM7,000, stamp duty on transfer as well the charge and legal fees in the sum of RM600, the plaintiff has failed to prove by way of evidence and or document that the said sums were incurred by him. Puan Rudzinah Anom bt Yahaya ('PW2') who testified for the plaintiff could not do much to assist the plaintiff and could not verily whether the loan was in fact taken by the plaintiff from BSN for the purchase of the property. PW2 too did not have personal knowledge of the alleged transaction. Neither could this witness produce documentary evidence to support the plaintiff's evidence in court. PW2 too was not able to confirm the amount of interest paid per month in respect of the BSN loan taken by the plaintiff to pay for the purchase of the property as stated in exh D18 as PW2 was not in charge of the plaintiff's account at that material time.

DUTY TO MITIGATE HIS LOSSES

[44] The plaintiff has a moral as well as legal duty to mitigate his losses and should not be allowed to take advantage of the process of the court to enrich himself unnecessarily. On the whole the plaintiff has failed to demonstrate to this court that he has taken reasonable steps to mitigate his losses. This is the basic and accepted principle of law. Although the law allows a claimant to claim compensation for pecuniary loss suffered as a result of a wrong committed by the adverse party he has a duty to take all reasonable steps to mitigate his losses and he ought not to take advantage of this process to claim excessively for damages not due to him (pl see *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 at p 689).

ANSWER TO ISSUES POSED FOR COURT'S DETERMINATION

[45] In view of the above findings, issue (i) posed by the plaintiff must be answered in the negative. As regards issue (ii) the answer too must be in the negative because in the OS, the High Court had awarded damages to the plaintiff as well as the chargor to be assessed. When the case went on appeal to the Court of Appeal the award of damages was set aside. As there were no damages ordered by the Court of Appeal to the plaintiff and the award of damages by the High Court has been set aside by the Court of Appeal therefore issue (ii) is a non-issue and was wrongly framed by the plaintiff in this case. In fact the damages which the plaintiff is claiming herein are the same as the damages ordered by the High Court which was set aside by the Court of Appeal. The plaintiff is therefore bound by the finality of the judgment of the Court of Appeal and could not now come back to this court for damages. In any event the plaintiff had wrongly framed his second issue for this court's determination.

[46] For the reasons that I have discussed above issues (i), (ii) and (iii) posed by the defendant must be answered in the affirmative.

CONCLUSION

[47] After giving full consideration to the evidence, both documentary as well as testimonial, and the submissions by both learned counsel for the defendant and the plaintiff I find that the plaintiff has failed to prove his claim as stated in the his SOC on the balance of probabilities. Accordingly I dismiss the plaintiff's claim against the defendant with costs in the sum of RM50,000 to be paid to the defendant.

Claim dismissed with RM50,000 costs.

Reported by Ashok Kumar